Supreme Court, U. S.
FILED
OCT 9 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
Appellant,

v.

BEN E. PITTMAN,
Appellee.

On Appeal from the
Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

JOHN McQUISTON, II
1400 Commerce Title Building
Memphis, Tennessee 38103
Attorney for Appellant

GOODMAN, GLAZER,
STRAUCH & SCHNEIDER
Of Counsel

TENNESSEE LAW PRINTERS, P. O. Box 37, Knoxville, Tennessee. Phone 525-6662

10-5-73-80

INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTION PRESENTED	3
STATEMENT	3
HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW	12
THE FEDERAL QUESTION IS SUBSTANTIAL	15
CONCLUSION	26
APPENDIX	

AUTHORITIES CITED

Cases:

Bondurant v. Dahnke-Walker Milling Co., 195 S.W. 139 (Ken. 1917), affirmed after retrial, 215 S.W. 76 (Ken. 1918)	18
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 882 (1921)	21
Flanagan v. Federal Coal Co., 267 U.S. 222 (1925)	20
Herb v. Pitcairn, 324 U.S. 117, 128 (1945)	14
H. P. Hood & Sons v. DuMond, 336 U.S. 525 (1949)	19
International Harvester Co. v. Kentucky, 234 U.S. 579 (1914)	21
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	22
Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)	22
Shafer v. Farmer's Grain Co., 268 U.S. 187 (1925)	20, 21

Whitney v. California,
274 U.S. 357 (1927) 14

Constitution:

U. S. Const. Art. I, § 8, Cl. 3 ..... 2, 3

Statutes:

Commodity Exchange Act, September 21, 1922, c. 369, 42 Stat. 998, as amended by Act of June 15, 1936, c. 545, 49 Stat. 1941, as amended, 7 U.S.C.A. Sec. 1 .... 11, 24, 25
Miss. Code 1942 Ann. § 5309-221 13
Miss. Code 1942 Ann. § 5309-239 (Supp. 1972) 2, 3, 6, 13, 14
28 U.S.C. § 1157 (2) 1
28 U.S.C. § 2103 2

Texts:

A. B. Cox, *Cotton-Demand, Supply & Marketing* (Hemphill, Austin, Texas (1953) 7, 24
A. H. Garside, *Cotton Goes to Market* (Fredrick Stokes Co., New York, 1935) ... 10
T. S. Miller, *The American Cotton System* (Austin, Tex. 1909) 10
U. S. Department of Agriculture, *August 1 Crop Report* (August 9, 1973) 15, 24
U. S. Department of Agriculture, *Cotton Situation* CS-253 (Oct. 1971) 12, 15, 24

Miscellaneous:

Dictionary of the English Language (Random House, Unabridged 1966) 15
F.R.E. Rule 201 6

The Federalist No. 11, at 52 (Cooke ed. 1961), cited in Note, Developments-State Taxation, 75 Harv. L. Rev. 953, 956 (1962) 26
Foreign Corporations - State Boundaries for National Business, 59 Yale L.J. 737, 746 (1959) 21
Hearings Before the Subcommittee on Domestic Marketing and Consumer Relations of the Committee on Agriculture, 92nd Cong., 2nd Sess. 23
Isaacs, An Analysis of Doing Business, 25 Col. L. Rev. 1018 (1925) 21
The Memphis Commercial Appeal, February 1, 1973, p. 55 24
The Memphis Commercial Appeal, September 21, 1973, p. 28 24
The Restatement of Conflicts of Laws 2d at Section 311 (f) 22
Supp. for 1972 to Bulletin No. 417-Statistics on Cotton and Related Data 1930-1967, U. S. Department of Agriculture, pp. 58 and 77 5

INDEX TO APPENDIX

Opinion, Supreme Court of Mississippi ..... A. 1
Judgment, May 14, 1973 ..... A. 8
Notice of Appeal, Filed 8/8/73 ..... A. 9
Order, August 7, 1973 ..... A. 11
Order Certifying Issues Decided, August 17, 1973 ..... A. 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

ALLENBERG COTTON COMPANY, INC.,
Appellant

v.

BEN E. PITTMAN,
Appellee

On Appeal from the Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Mississippi is set forth in the Appendix, infra pp. A. 1-A. 7, and is reported at 276 So. 2d 678 (1973).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1157 (2), this being an appeal which draws into

question the validity of Miss. Code 1942 Ann. §5309-239 (Supp. 1972) infra, p. 2, as applied to the facts of this case by the Mississippi Supreme Court, on the ground that as applied it is repugnant to the commerce clause of the Constitution of the United States.

Appellant sued in the Chancery Court of Quitman County, Mississippi to enforce its rights under a contract to buy cotton from appellee. The Chancery Court found a breach of contract to deliver cotton by appellee and awarded damages of $18,156.00 and costs. The Supreme Court of Mississippi reversed and dismissed appellant's suit. On May 14, 1973 a Petition for Rehearing was denied. Timely notice of appeal to this Court was filed in the Supreme Court of Mississippi on August 8, 1973. An extension of time in which to docket this appeal was granted by the United States Supreme Court on August 7, 1973 to and including October 11, 1973. As the Supreme Court of Mississippi explicitly decided that appellant's contract and activities were not in interstate commerce within the protection of the commerce clause of the United States Constitution, this matter is appropriately brought to this Court by appeal.

In the event the Court does not consider appeal the proper mode of review, appellant requests the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the commerce clause of the Constitution of the United States, U. S. Const. Art. I, §8, Cl. 3.

This case also involves Miss. Code 1949 Ann. §5309-239 (Supp. 1972) which states, in relevant part:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.

QUESTION PRESENTED

Can the Mississippi courts absolutely ignore controlling constitutional precedent, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U S. 882 (1921), and bar a foreign corporation from enforcing its contracts for the purchase of raw agricultural products in Mississippi?

STATEMENT[1]

In this case the Mississippi Supreme Court ignored a United States Supreme Court decision on all fours, *Dahnke-Walker Milling Co. v. Bondurant, supra*. As a direct result of this decision, cotton farmers in Mississippi are today repudiating their contracts for the sale of cotton on a scale which is massive and unprecedented in the history of the United States. Cotton merchants have purchased over 70% of the 1.6 million bales of cotton expected to be produced in Mississippi in 1973, and they have resold the overwhelming majority of it at lower than current prices to foreign and domestic buyers. In the six months preced-

[1] Page references in the record are to testimony received in a companion case (Allenberg vs. H. T. Pittman, No. 7643). By stipulation and agreement the facts in the companion case are adopted in the instant case (R. 119, 120).

ing this writing the price of cotton has climbed 250%. Farmer repudiations in Mississippi alone can bankrupt the entire cotton merchandising industry.

Put in simplest terms, this appeal asks for an immediate reaffirmance of the principle that no state may raise artificial barriers to the purchase of its raw agricultural products for shipment in interstate commerce.

Appellant, Allenberg Cotton Company, Inc., a Tennessee corporation, based in Memphis, Tennessee, arranged with one Covington, a cotton buyer located in Marks, Mississippi, to elicit offers for the sale of cotton from cotton farmers in the area around Marks (R. 48, 65, 66). Covington had performed this service for another cotton merchant in past years, but in 1971, the year of the subject contract, Covington, for reasons of his own, acted only for Allenberg, although he was not restricted to Allenberg by any agreement (R. 50, 52, 69). Under his arrangement with Allenberg, Covington would discuss with a local farmer the number of acres of cotton the farmer might be willing to sell, the price at which he would be willing to sell, and the gin to be used (R. 54, 55). Covington had no authority from Allenberg other than authority to elicit offers to sell (R. 60, 61, 65, 66). Covington would then telephone the Allenberg office in Memphis, Tennessee, and tender the terms of the farmer's offer to sell (R. 54, 67). Covington had no authority to enter into a crop purchase contract (R. 74). If the Allenberg office in Memphis accepted the farmer's offer to sell, a written contract would be signed in Memphis by Allenberg, and mailed to Covington, who would then have the farmer sign the contract (R. 57, 63). The Pittman contract here involved was handled in the normal manner as indicated above, except that it was delivered by an official of Allenberg from Memphis to Marks (R. 56). Under the terms of the con-

tract, after harvesting the cotton, Pittman was to have his cotton ginned and stored at a cotton compress (R. 7, 8). Samples of the cotton were to be sent to the U. S. Department of Agriculture for classification and to Allenberg's office in Memphis (R. 7, 8). To obtain payment Pittman was to deliver the classification documents and warehouse receipts to Allenberg or Covington (R. 7, 8). Memphis Cotton Exchange Rules governed the contract (R. 7, 8).

These same procedures are used by Allenberg throughout the Cotton Belt, including Mississippi, Arkansas, Missouri, Tennessee, Louisiana, California, Arizona and Texas (R. 70-78).

The cotton bought by Allenberg in Mississippi, including Pittman's cotton, was all purchased for shipment outside Mississippi (R. 60, 80, 99). The Pittman cotton was to be temporarily stored at a Mississippi warehouse designated in the contract pending its shipment to a customer of Allenberg outside of Mississippi (R. 60, 80, 99). *All* of the cotton purchased by Allenberg in Mississippi in the 1971 crop year was shipped by interstate carrier outside the state of Mississippi[2] (R. 73, 74). At the time of the Pittman purchase, Allenberg was already obligated to customers outside the state of Mississippi to sell them cotton (R. 63). The Pittman cotton was purchased for the purpose of satisfying part of this obligation (R. 63).

The Pittman contract was entered into January 28, 1971 (R. 7, 8). At harvest time on November 9, 1971, the Pittman cotton was worth $18,156.00 more than the contract

---

[2] Virtually all of the 1,693,000 bales of cotton grown in Mississippi in 1971 were shipped out of the state because there is no significant amount of milling of cotton performed in Mississippi. U. S. Department of Agriculture, **Supp. for 1972 to Bulletin No. 417-Statistics on Cotton and Related Data 1930-1967**, pp. 58 and 77.

price, and Pittman refused to deliver the cotton to Allenberg (R. 121, 122). Allenberg sued in the Chancery Court of Quitman County, Mississippi, to enforce its rights under the contract. The Chancery Court found a breach of contract by Pittman and awarded damages to Allenberg of $18,156.00 and costs (R. 126a). On direct appeal to the Supreme Court of Mississippi, that court reversed and dismissed the case, holding that Allenberg was a foreign corporation transacting business within Mississippi without a certificate of authority, and that Miss. Code 1942 Ann. §5309-239 (Supp. 1972) barred Allenberg from maintaining suit in the courts of Mississippi.

The following material on trade procedure in marketing cotton is included to show the industry context of this case and to explain the cotton merchant's function in directing cotton through the channels of interstate commerce.[3]

One of the primary functions of the cotton merchant is to assemble from all parts of the United States Cotton Belt and elsewhere in the world quantities of "even-running cotton":

> Each of the thousands of mills manufacturing cotton throughout the world specializes by necessity in a narrow range of products, and each requires specific qualities of "even-running" cotton for efficient operation.
>
> Raw cotton is produced on millions of farms; and on most of these farms each bale is of a different quality due to variations in soil, time of planting, harvesting, changes in weather, variety of cotton planted, and many other causes. A vital function then of cotton merchandisers is to assemble these odd-lot bales and pool them with other bales of like qualities to make up "even-

[3]The Court is requested to take judicial notice of the following materials, F.R.E. Rule 201.

running" lots to meet the requirements of spinners wherever they are. Strange as it may seem the three or four bales grown by any one farmer may need to be, and sometimes are, actually sent to different parts of the world in order that each bale may find its best market and most efficient use. It is thus quite possible that a bale of cotton grown near a cotton mill in Texas will find its most economical use in a mill deep in France, or even a mill on the banks of the Ganges River in India alongside another cotton field; and a bale grown in India, because of its wooly nature, may be sent to the United States to be mixed with wool in making blankets and rugs.[4]

Making yarn out of raw cotton is highly technical and requires the use of several different machines. There are six distinct processes in making yarn, usually spoken of as spinning, as follows: (1) mixing, (2) opening, (3) beating, (4) carding, (5) drawing and (6) spinning.

> Every cotton spinning mill is equipped to balance on a specific quality of cotton . . . A mill equipped to balance on Strict Middling cotton would not clean Strict Low Middling fast enough to keep the second set of equipment busy. Moreover, rolls set to draw 7/8 inch cotton could not handle 1-1/16 inch without substantial adjustments. These facts alone justify the spinning mill's insistence on delivery of the exact quality of cotton it buys.[5]

* * *

Reasons for mill insistence on uniformity of staple length in cotton are made manifest at this point in the

[4]A. B. Cox, **Cotton-Demand, Supply & Marketing** (Hemphill, Austin, Texas 1953), PP. 4-5.

[5]A. B. Cox, Supra, n. 4, p. 49.

manufacturing process. If some of the cotton is long staple and some short and the mill operator sets his rolls to clear the long fibers, the short ones are not drawn and tend to fall down between the rolls and cause much waste. If the rolls are spaced for the short fibers, the long ones are caught by two pairs of rollers and are stretched or broken; the result is ragged, buckled yarn. In no case is it possible to make smooth yarn economically with such staple mixtures.[6]

Because of the needs of the textile industry as described above, cotton bought in various places of the world is grouped together by merchants, such as Allenberg, into even-running lots before delivery to the mills which are its customers. This grouping is done by the merchant's experts on the basis of the government classification of the cotton, and on the basis of the samples delivered to Allenberg's Memphis office.

The commodity traded in spinners' markets is not just cotton. It is even-running quality cotton usually in minimum lots of 100 bales, and not infrequently the contract may be for thousands of bales. A lot is even-running when qualities that are measurable are alike in each bale: the grade is the same, the staple length is the same and the color is the same.[7]

While the cotton is being classed and assembled into even-running lots on the basis of the samples, the bale itself remains in the warehouse to which it was delivered by the farmer because it is unnecessary and uneconomical to ship the actual bale to Memphis.

---

[6] A. B. Cox, Supra, n. 4, pp. 50-51.

[7] A. B. Cox, Supra, n. 4, p. 168.

Cotton concentration is a major service performed in cotton marketing. Farmers start the job of assembling cotton when they haul it to the gins and local markets to be made into bales and sold. It is bought and handled in farmers' markets in what is known as "Odd Lots", in units most often of one to a few bales at a time. Farmers aid in concentration but what they do is not a part of concentration as the term is used in cotton marketing. Concentration means specifically the assembling of "Odd lot" cotton into even-running lots in warehouses selected by cotton merchants for the purpose. These warehouses are located in towns and cities best situated to serve important areas of cotton production, or strategically located with reference to the market for the cotton of the area. These cities, properly equipped with transportation and communication facilities and with warehouse space and compresses, have come to be known as cotton concentration points.

The managerial work of cotton concentration takes place in the merchant's office. The classing department determines the class of each bale bought. Cards are made out for each bale showing in detail the qualities of each bale, its mark, origin, weight, location, price, etc. The cards then become the means of making up even-running qualities and of picking out bales to ship. The facts for cotton concentration for cotton marketing operations are on these records in the merchant's office. Even-running lots to ship to a mill are thus made up in the merchant's office and not by warehousemen.

The actual picking out of the bales of cotton, tagging and marketing them for shipment, loading the bales into

cars and taking out the bill of lading are functions performed by warehousemen at the direction of the cotton merchant.[8]

Because the price of cotton is subject to great fluctuations, all those who handle the commodity in large quantities must protect themselves from rapid price changes by either assuring an actual market for the cotton held by them, or by use of the future exchange. In the Pittman case, Allenberg had already assured itself of a market by advance sales at the time it contracted to buy the cotton in Mississippi.[9]

Where the merchant does not already have a customer to buy the cotton, cotton bought by the merchant is, by normal industry practice, hedged by offsetting sales on the New York Cotton Exchange.[10] The economic function of the futures market is well known and needs no lengthy explanation here.[11]

---

[8] A. B. Cox, Supra, n. 4, pp. 233-234.

[9] For an explanation of this practice see first example, Infra, n. 9.

[10] This practice is described in several textbooks, see A. B. Cox, Supra, n. 3, p. 259 et seq; A. H. Garside, **Cotton Goes to Market** (Fredrick Stokes Co., New York, 1935) p. 206 et seq; T. S. Miller, **The American Cotton System** (Austin, Tex. 1909) p. 102 et seq.

[11] "It is the function of the commodity futures market to eliminate or reduce the risk of price fluctuations in the process by which a commodity moves from grower to consumer. The method whereby this is accomplished using the cotton business as an example, is as follows: Contracts on the exchange call for the purchase or sale of cotton for future delivery during a specified month from one to eighteen months from the date the contract is made. A person engaged in the production, manufacture or sale of cotton may take a position on the exchange by buying or selling cotton for future delivery to offset his purchase or commitments in the actual commodity and thus hedge (insure) against price fluctuations. This can be illustrated by the example of a merchant who sells spot cotton for delivery to a mill six months from now at a fixed price which gives him a fixed profit based upon current spot prices. He does not now have the cotton

(Continued on following page)

It is sufficient to point out that any merchant who contracts to buy cotton from a farmer should either assure itself of a market by resale to a mill, or should make offsetting sales (hedges) on the cotton exchanges.[12] In either case there is immediate and direct reliance on the validity and enforceability of the cotton purchase contract entered into between the merchant and the farmer. If the contract with the farmer cannot be enforced, the merchant is no longer hedging within the meaning of the Commodity Exchange Act,[13] but becomes an unintended speculator subject to enormous loss if the price of cotton goes up, because the merchant must replace the cotton it has sold

---

(Continued from preceding page)

and therefore takes the risk of a change in the spot price when he is to acquire it to fulfill his commitment to deliver. To guard against this risk of a change in price, he takes a long position on the futures market of an equivalent amount of cotton (i.e., he makes a contract to purchase cotton for future delivery on the exchange). If the price of spot cotton increases during the six-month period, the price of futures will tend to increase correspondingly and the loss he sustains in having to pay a higher price for spot cotton will be offset by the gain in price on the futures market when he closes out his futures contract at a profit. In another case, the merchant purchases cotton for inventory from a farmer at a fixed price. To avoid the risk of a change in price when he is ready to sell it, he takes a short position on the futures market (i.e., he makes a contract to sell cotton for future delivery on the exchange). If the price of spot cotton decreases the price of futures will tend to decrease correspondingly and the loss he sustains in the value of his inventory will be offset by his gain on the futures market when he closes out his futures contract at a profit . . . The futures exchange is used by those who grow, manufacture, process, sell and utilize cotton and cotton products and wish to hedge against price fluctuations." **Volkart Brothers, Inc. v. Freeman**, 311 F.2d 52 (5th Cir. 1962) pp. 54-55.

[12] The New York Cotton Exchange is a designated contract market under the Commodity Exchange Act. Act of September 21, 1922, c. 369, 42 Stat. 998, as amended by Act of June 15, 1936, c. 545, 49 Stat. 1941, as amended, 7 U.S.C.A. Sec. 1 et seq.

[13] "Bona fide hedging transactions shall mean sales of any commodity for future delivery on or subject to the rules of any board of trade to the extent that such sales are offset in quantity by the ownership and purchase of the same cash commodity or conversely, purchases of any commodity for future delivery on or subject to the rules of any board of trade to the extent that such purchases are offset by sales of the same cash commodity." Commodity Exchange Act, Supra, n. 9, § 6a (3).

to its customer, or sold on the cotton exchange, by buying replacement cotton at the higher market price. If these losses exceed the merchant's capital, defaults will result in the contracts on the exchange or with the mills.[14] The integrity of the merchant's contract with the initial source of supply, the farmer, is thus the foundation of the entire commodity merchandising system.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Prior to trial, Pittman filed an "Answer to [Allenberg's] Amended Bill of Complaint and Decree of Discovery" (R. 17, 18) setting forth as an affirmative defense that Allenberg was "a foreign corporation doing business in the State of Mississippi and it is not qualified to do business in the State of Mississippi as required by § 5309-221 of the Mississippi Code of 1942 Annotated." (R. 18).

After hearing evidence on the circumstances concerning the making of the crop purchase contract and Allenberg's

[14] Bank financing of the cotton merchant may allow the merchant to borrow up to 90% of the price of the raw cotton, because the bank, too, relies on the sale of futures against the purchase of cotton from the farmers to protect the merchant from market risks due to price fluctuations. This allows the cotton merchant to handle a large quantity of cotton on a relatively small amount of capital. A. B. Cox, Supra, n. 4, p. 181. In a year of violent price change such as the current year, 1973, the merchant will find that if it cannot enforce its contracts with the farmer, it must replace the cotton sold to mills or on the exchanges after prices have more than doubled. For example, assume that the price of a standard grade of cotton was 30¢ per pound on February 1, 1973. The merchant contracting to buy cotton from a farmer on that date might have made a sale to a mill at 33¢ which assured him of a 3¢ per pound gross profit. However, if in September 1973, the merchant finds that it cannot enforce its contract with the farmer, and the price of cotton is then 85¢ per pound, the merchant's potential loss is so huge it threatens the entire system because it can far outstrip the merchant's capital. Replacement of only 100,000 bales of cotton at that market difference would produce a $26 million loss. A large proportion of the nation's cotton is handled through merchants in Memphis, Tennessee. U. S. Department of Agriculture, **Cotton Situation** CS-253 (Oct. 1971) p. 13. The 1971 cotton crop in Mississippi alone was 1,693,000 bales. Infra, n. 2, p. 13.

activities in Mississippi, and after argument by the parties, the Chancery Court of Quitman County entered a decree that Allenberg was not doing business within the State of Mississippi under § 5309-239 of the Mississippi Code of 1942 (R. 114a).

§ 5309-221 of the Mississippi Code of 1942 is a companion to § 5309-239 and contains a listing of activities which are not "transacting business" under § 5309-239. § 5309-221 provides, inter alia, that "a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this Act, by reason of carrying on in this state any one or more of the following activities: . . . (e) transacting any business in interstate commerce." By its terms the Mississippi statute is coterminous with the Commerce Clause of the Constitution.

On appeal, the Supreme Court of Mississippi reversed, stating: "Nor is the transaction converted into interstate commerce because, after the cotton had been delivered to Allenberg at the warehouse in Marks and title thereto had become vested in Allenberg in Mississippi, Allenberg, at its own election and for its own purposes, might, afterward sell it in interstate commerce." Opinion of the Mississippi Supreme Court, infra, appendix p. A. 1. This was a flat rejection of Allenberg's contention that its activities were in interstate commerce.

A timely petition for rehearing was denied by the Mississippi Supreme Court on May 14, 1973.

By certificate from the Supreme Court of Mississippi, Appendix, infra pp. A. 12-A. 13, it is established that:

> In this appeal from the Chancery Court of Quitman County, and in the arguments both oral and by brief made in this court on behalf of the appellee [Allenberg]

on the original appeal and the petition of appellee for rehearing and brief filed in support thereof, it was insisted by appellee that under the facts of this case, the contract sued upon by the appellee was made in interstate commerce and that it was transacting business in interstate commerce, and thus entitled to protection as such under the applicable statutes of Mississippi and the Commerce Clause of the Federal Constitution; and that in its deliberation of this case, this Court both on the original appeal and the petition of rehearing considered these questions of interstate commerce; and it was the judgment of this Court that said contract was not made in interstate commerce, nor that the facts of the case showed appellee to be transacting business in interstate commerce within the meaning of the laws of Mississippi and that Mississippi Code 1942 Ann. Section 5309-239 (Supp. 1972) as applied by this Court in this case to the Allenberg Cotton Company, Inc., a Tennessee corporation, to bar it from maintaining suit in the courts of this state was not repugnant to the Commerce Clause of the United States Constitution; and it was necessary to the Court's judgment in said case to determine said questions raised as to interstate commerce, and that such questions were determined adversely to the position of appellee.

The Certificate is "clear and decisive in stating whether a Federal question, and if so, what Federal question, was decided as a necessary ground for reaching the judgment under review."[15]

[15] **Herb v. Pitcairn**, 324 U.S. 117, 128. (1945) **Whitney v. California**, 274 U.S. 357 (1927).

THE FEDERAL QUESTION IS SUBSTANTIAL

The issue raised in this appeal is of importance to the cotton industry, and it is of importance to the merchandising of all raw agricultural commodities in the United States. If merchants who serve national and international markets by purchasing farm products such as cotton, wheat, soybeans, cattle, corn, oats, hogs, sugar or any raw agricultural commodity throughout the nation, must qualify to do business in every state where purchases are made, then the goal of free trade among the states will have been abandoned. If present contracts are not enforceable, enormous economic dislocations may occur immediately.

The decision in this case will have a profound effect on the continuation of the practice of advance or forward contracting between agricultural merchants and cotton farmers. Although this practice has become widespread only in the very recent past, it is now of vital importance. In 1973 farmers have forward contracted 45% of the entire United States upland[16] cotton crop, as compared with 32% in 1972,[17] and only 11% in 1970.[18]

The practice of advance contracting replaces United States government advance payments and price supports with the financing available from commercial sources based on the agricultural merchant's fixed price purchase contract. The advance purchase contract makes it pos-

[16] "Upland cotton" is also called "American cotton." The term upland cotton means cotton grown in the southeastern United States. **Dictionary of the English Language** (Random House, Unabridged 1966) p. 1570. The 1973 United States cotton crop is expected to be 12,740,000 bales of which 12,648,000 bales is upland. U. S. Department of Agriculture, **August 1 Crop Report** (August 9, 1973) p. 2.

[17] **August 1 Crop Report**, supra n. 16, pp. 2 and 12.

[18] U. S. Department of Agriculture, **Cotton Situation**, CS-253 (Oct. 1971) p. 12.

sible for the farmer to fix the return on his expected investment *before* he plants his crop. As the practice becomes widespread it replaces government price supports because the forces of supply and demand at the beginning of the crop year will determine whether or not the farmer plants, and if so, how much. In contrast, the traditional method of marketing assures the farmer no return on investment and boom and bust cycles are prevented only by government intervention in the market.

If the out-of-state merchant cannot enforce his advance purchase contract with the farmer, that merchant will withdraw from competition for the farmer's crop.[19] This is directly contrary to the open economy which the commerce clause was intended to produce.[20]

A. THE ISSUE UNDER THE COMMERCE CLAUSE

A state cannot condition the right of a foreign corporation to sue upon a contract for the interstate purchase of goods.[21]

The question in this appeal is whether or not Allenberg's purchase of cotton for shipment outside Mississippi was an activity which the State of Mississippi could condition by requiring that Allenberg first qualify to do business in Mississippi.

---

[19] In the past there has been no problem with the enforcement of cotton purchase contracts by foreign corporations because physical delivery of warehouse receipts was made contemporaneously with the contract of sale. Under the old system, of course, sales will not be made until after the crop is harvested.

[20] See **The Federalist** Nos. 7, 22 (Hamilton), No. 42 (Madison); Brown, **The Open Economy: Justice Frankfurter and the Position of the Judiciary**, 67 Yale L. J. 219, 229 (1965).

[21] **Dahnke-Walker Milling Co. v. Bondurant**, 257 U.S. 882 (1921); **International Textbook Co. v. Pigg**, 217 U.S. 91 (1910).

B. ALLENBERG'S ACTIVITIES WERE PROTECTED BY THE COMMERCE CLAUSE FROM THE BURDENS IMPOSED BY MISSISSIPPI

It is the contention of Allenberg that this case is controlled by *Dahnke-Walker Milling Co.*[22] which held that where raw agricultural goods are purchased in one state for shipment to another, the purchase contract is protected by the commerce clause, and the purchaser may not be required to qualify in order to sue on the purchase contract.

In *Dahnke*, a Kentucky farmer contracted with another resident of Kentucky, one John Creed, to sell his wheat crop, estimated at 14,000 bushels. Creed was the agent of Dahnke-Walker Milling Co., a Tennessee corporation. The farmer testified that he was not told that Creed was an agent for anyone and Creed disputed this. The factual difference was never resolved, the state court expressly determined that its decision would be the same in either case, and the United States Supreme Court apparently came to the same conclusion because it did not mention the conflict. Under the contract, the buyer was free to consign the wheat to such destination as it saw fit. There was no contract stipulation that the wheat was to be shipped out of the state. Delivery of the wheat and payment were both to be performed in Kentucky. The purchase by the Tennessee corporation was not an isolated transaction because the corporation had purchased other quantities of wheat in Kentucky at other times. The Tennessee corporation sued in the Kentucky courts, and the farmer defended on the basis that the corporation had failed to qualify to do business in Kentucky. The Kentucky Supreme Court

---

[22] Supra, n. 21, hereinafter **Dahnke**.

agreed with the farmer, held that the transaction was not in interstate commerce and denied the Tennessee corporation access to the Kentucky courts.[23]

On appeal, the United States Supreme Court reversed and held that as the state court applied the state statute to the plaintiff Tennessee corporation, the statute was repugnant to the commerce clause of the Constitution and was void. The Court stated that:

> Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. [citations omitted] On the same principle, ***where goods are purchased in one state for transportation to another, the commerce includes the purchase*** quite as much as it does the transportation.
>
> * * *
>
> A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause.[24]

The *Dahnke* decision establishes that the activities of Allenberg in buying cotton in Mississippi were commerce;

[23] **Bondurant v. Dahnke-Walker Milling Co.**, 195 S.W. 139 (Ken. 1917), affirmed after retrial, 215 S.W. 76 (Ken. 1918). The above summary of facts is drawn both from the state court opinion and the opinion of the United States Supreme Court cited in note 22, **supra**.

[24] **Dahnke**, Supra, n. 21, pp. 290-291 (emphasis added).

that commerce was interstate; and a state statute barring Allenberg from enforcing its purchase contract unless it qualifies in Mississippi is a burden on that interstate commerce which is repugnant to the commerce clause and void.

The decision in *Dahnke* has been followed in cases too numerous to list here, and it is one of the cornerstones of American law.[25] The principle of free access to the products of the land is central to the founders' intent that the states' respective products would be freely interchanged.[26]

> The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions. We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority.
>
> Our system, fostered by the Commerce Clause is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.[27]

[25] **Shepard's United States Citations** lists 461 citations of Dahnke.

[26] Infra, n. 27, and Supra, n. 20.

[27] **H. P. Hood & Sons v. DuMond**, 336 U.S. 525 (1949).

In *Shafer v. Farmer's Grain Company*,[28] this Court struck down a North Dakota statute imposing licensing and other requirements on buyers of grain in North Dakota saying:

> Buying for shipment, and shipping, to markets in other states, when conducted as before shown, constitutes interstate commerce,—*the buying being as much a part of it as the shipping*. We so held in Lemke v. Farmers Grain Co., 258 U.S. 50, 66 L. Ed. 458, 42 Sup. Ct. Rep. 244, following and applying the principle of prior cases. Later cases have given effect to the same principle. Stafford v. Wallace, 258 U.S. 495, 516, 66 L. Ed. 735, 741, 23 A.L.R. 229, 42 Sup. Ct. Rep. 397: Binderup v. Pathe Exch., 263 U.S. 291, 309, 68 L. Ed. 308, 316, 44 Sup. Ct. Rep. 96.[29]

In *Shafer* wheat was purchased in North Dakota at some 2,200 country grain elevators by the agents of the owners and operators of the elevators. The buyers were located in the state and the contracts were made within the state. The wheat was held in the local elevators until car load lots could be assembled. 10% of the wheat was consumed in North Dakota, and 90% was bought within the state by buyers who purchased for shipment to markets outside the state.

In the cotton trade merchants like Allenberg buy cotton from the farmers in Mississippi who deliver the cotton to warehouses. Allenberg, like similar merchants, makes its purchases through the aid of country brokers who are not employees of Allenberg, but are independent contractors

[28] 268 U.S. 187 (1925). See also **Flanagan v. Federal Coal Company**, 267 U.S. 222 (1925).

[29] **Shafer v. Farmer's Grain Company**, Supra, n. 28, pp. 198-199. (emphasis added).

paid on a commission basis, thus there is even less contact in the farm state by the cotton merchant than there was in the farm state by the wheat buyers in *Shafer*. From the warehouses the cotton is grouped into even running lots for shipment and is shipped out of state. The warehouse and the grain elevator thus perform similar functions. The *Shafer* Court stated unequivocally:

> Wheat—both with and without dockage—is a legitimate article of commerce and the subject of dealings that are nationwide. *The right to buy it for shipment*, and to ship it, in interstate commerce, *is not a privilege derived from state laws*, and which they may fetter with conditions, *but is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution*.[30]

C. NO COUNTERVAILING POLICY IS SERVED BY THE MISSISSIPPI COURT'S DECISION

The policy served by barring a foreign corporation from access to local courts is said to be the protection of the state's citizens from lack of redress in local courts against foreign corporations.[31] However, today every state provides for service of process under long-arm statutes,[32] and it is recognized that whether a foreign corporation is protected by the commerce clause should have no bearing on whether or not service of process may be had upon it.[33]

[30] **Shafer v. Farmers Grain Company**, Supra n. 28, p. 199.

[31] Note, **Foreign Corporations - State Boundaries for National Business**, 59 Yale L. J. 737, 746 (1959).

[32] Note, Supra n. 31 p. 740, See e.g. Miss. Code 1942 Ann. § 1437.

[33] **International Harvester Co. v. Kentucky**, 234 U.S. 579 (1914). **Isaacs, An Analysis of Doing Business**, 25 Col. L. Rev. 1018 (1925). "A foreign corporation's activities within the state may be sufficient to

(Continued on following page)

If a foreign corporation is "doing business" within the meaning of the due process clause of the Constitution, process may be had upon it even though it may not be required to qualify to do business because its activities are interstate commerce.[34] Furthermore, no important state

---

(Continued from preceding page)
subject it to jurisdiction and make it amenable to service of process, and yet be insufficient to constitute doing business so as to require it to qualify under the statute." **Stafford-Higgins Industries, Inc.**, 300 F. Supp. 65, 67 (S.D.N.Y. 1969).

[34]The decision of the Mississippi Supreme Court fails to differentiate between different meanings of the words "doing business". The concept of "doing business" is used as a guideline in the attempt of various courts to make three different types of decisions: 1) whether the state may exercise judicial jurisdiction over the corporation; 2) whether the state may impose a tax on the corporation; 3) whether the state may require that the corporation comply with certain qualification requirements as a condition to conducting certain types of business activities.

The **Restatement of Conflicts of Laws 2d** at Section 311 (f) points out that these three disparate cases must be distinguished and concludes that "the degree of required activity may vary somewhat from context to context. So a lesser degree of doing business is required for the exercise of judicial jurisdiction over a foreign corporation than that usually required to make it necessary for a corporation to comply with the qualification requirements of a state."

The differences in these three types of cases reflect the different goals of the due process clause and the commerce clause. In determining whether a state may exercise judicial jurisdiction the central question is one of fairness under the due process clause; i.e. whether or not it is fair to require the foreign corporation to respond to process in the forum where it has been sued. **International Shoe Co. v. Washington**, 326 U.S. 310 (1945).

In the second type of case, the taxing cases, this Court has stated that a fairly apportioned state tax will not contravene the commerce clause; and it appears that if the state tax meets the requirements of the due process clause it will therefore not be a burden on interstate commerce repugnant to the commerce clause. **Northwestern States Portland Cement Co. v. Minnesota**, 358 U.S. 450 (1959).

In contrast, the central question in this case, as in **Dahnke**, is not a question of due process but is whether or not the action by the state is inimicable to the intention of the commerce clause to establish free trade among the states. That question is not one of fairness but whether or not the particular state action unduly burdens the operation of an open economy. The devastating consequences of a challenge to **Dahnke** reflects, in a negative way, the essential soundness of **Dahnke**. See text at notes 39-40, infra.

interest is served by a statute prohibiting the access of a foreign corporation to local courts. Denial of access only produces a windfall for a wrongdoer who is not even within the class of persons the qualification statute is designed to protect. Presumably, the statute is intended to provide redress in local courts for plaintiffs, but defendants are the only parties protected under such statutes. Defendants' claims may be made against the plaintiff foreign corporation which has joined issue with it, without concern over obtaining jurisdiction locally.

D. LONG STANDING PRINCIPLES MUST BE SUPPORTED BY THIS COURT

Fundamental principles must, from time to time, be reaffirmed if they are to have continuing validity. The legal position maintained here by Allenberg has, without doubt, been widely relied upon by large segments of the cotton merchandising industry, as well as by commodity merchants of all kinds. Cotton merchants such as Allenberg handle 70% of the entire U. S. cotton crop sold to domestic mills, and 80% of the U. S. Cotton crop sold in foreign markets.[35] To the extent that doubt may be cast on the continued validity of *Dahnke*, great dislocations may be caused in a current year of wildly increased commodity prices, as well as in the years to come. In the cotton industry alone the ramifications of a challenge to *Dahnke* cannot be exaggerated. At the time of this writing 45% of the entire United States upland cotton crop has been sold in advance of harvest.[36] The expected United

---

[35]**Hearings Before the Subcommittee on Domestic Marketing and Consumer Relations of the Committee on Agriculture**, 92nd Cong., 2nd Sess. (Statement of Neal P. Gillen, Vice-President and General Counsel, American Cotton Shippers Association in connection with H.R. 14987 on August 16, 1972).

[36]Infra, n. 11.

States cotton crop is 12,740,000 bales.[37] The price of cotton has advanced from high normal levels early in the season (e.g. middling 1-1/6" cotton in the Memphis market was 31.50¢ per pound on January 31, 1973),[38] to the highest prices in 100 years (e.g. on September 21, 1973 middling 1-1/6" cotton was 86.40¢ per pound in the Memphis market).[39]

Because cotton is produced in so many states, and because the bulk of the United States crop is handled by merchants in Memphis, Tennessee,[40] it may be assumed that few, if any, merchants are qualified to do business in every state in which they have bought cotton. At a market difference of 50¢ per pound, if only a small portion of the crop which has been bought in advance is not delivered at the contract price, merchants would have enormous losses. Because the merchant buys cotton with up to 90% borrowed capital,[41] such losses could be sufficient to bankrupt the entire cotton merchandising industry.

The traditional understanding of interstate commerce includes within the concept "interstate," the purchase of goods for shipment across state lines. This is reflected in the Commodity Exchange Act,[42] which defines interstate commerce as follows:

> For purposes of this Act . . . a *transaction* in respect to any article *shall be considered to be in inter-*

[37] **August 1 Crop Report**, Supra, n. 16, p. 2.

[38] **The Memphis Commercial Appeal**, February 1, 1973, p. 55.

[39] **The Memphis Commercial Appeal**, September 21, 1973, p. 28.

[40] **Cotton Situation**, Supra, n. 14.

[41] A. B. Cox, Supra, n. 4, p. 181.

[42] Commodity Exchange Act, Supra, n. 12.

> *state commerce if such article is part of that current of commerce usual in the commodities trade* whereby commodities and commodity products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another, *including* in addition to cases within the above general description, *all cases where purchase* or sale *is* either *for shipment to another state*, or for manufacture within the state and the shipment outside the state of the products resulting from that manufacture. Articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto, from the provisions of this Act.[43]

The above definition is itself an interpretation of the commerce clause by the Congress, and it reflects the understanding by Congress that transactions made in a manner usual in the commodities trade, including purchases for shipment, are within the ambit of the commerce clause of the Constitution.[44]

Hamilton wrote, "an unrestrained intercourse between the states themselves will advance the trade of each, by an interchange of their respective productions, not only

[43] Commodity Exchange Act, Section 3, Supra, n. 12 (emphasis added).

[44] This understanding is also reflected in the exercise of Congressional power to protect the integrity of the national commodities merchandising system. The Commodities Exchange Act, Section 6c, Supra, n. 12, makes it "unlawful for any person to offer to enter into, enter into, or confirm the execution of any transaction involving any commodity, which is or may be used for . . . delivering any such commodity sold . . . in interstate commerce for the fulfillment thereof . . . if such transaction . . . is a fictitious sale."[3] If the purchase of Pittman's cotton by Allenberg is not a valid enforceable obligation, it would be fictitious under Section 6c and violate that law, because Allenberg had purchased Pittman's cotton to fulfill previously incurred delivery obligations in interstate commerce.

for the supply of reciprocal wants at home, but for exportation to foreign markets."[45]

The cotton merchandising system as it exists today is a realization of the goal foreseen by Hamilton. The decision of the Mississippi Supreme Court in this case is a direct challenge to that goal.

CONCLUSION

For the foregoing reasons, summary reversal should be granted, or in the alternative, probable jurisdiction should be noted.

Respectfully submitted,

JOHN McQUISTON, II
1400 Commerce Title Building
Memphis, Tennessee 38103

Attorney for Appellant

GOODMAN, GLAZER, STRAUCH & SCHNEIDER

Of Counsel

[45] **The Federalist No. 11**, at 52 (Cooke ed. 1961), cited in Note, Developments-State Taxation, 75 Harv. L. Rev. 953,956 (1962).

Appendix

IN THE SUPREME COURT OF MISSISSIPPI

NO. 47,037

[fol. 1]

BEN E. PITTMAN

v.

ALLENBERG COTTON COMPANY

SMITH, JUSTICE:

Allenberg Cotton Company, a Tennessee corporation, brought suit in the Chancery Court of Quitman County against Ben E. Pittman for injunctive enforcement of a contract for the purchase by it of cotton produced by Pittman in the year 1971 on 700 acres of his land in Quitman County, Mississippi. Under the terms of the contract, Pittman was required to plant, cultivate and harvest a crop of cotton on the land, employing methods provided in the contract, then to deliver it to Valley Gin Company in Marks, Mississippi for ginning. Under the contract, Allenberg retained certain control as to methods to be employed in the production of the cotton, and, after ginning, Pittman was obligated to deliver the bales for the account of Allenberg at the warehouse of Federal Compress and Warehouse Company at Marks, Mississippi. The contract also provided a formula for determining amounts to be paid for the cotton. The bill of complaint alleged a refusal on the part of Pittman to de-

[fol. 2] liver the cotton, and in addition to injunctive relief, demanded damages for breach of contract.

Allenberg Cotton Company, a Tennessee corporation, had never qualified to do business in the State of Mississippi. Its charter, granted by the State of Tennessee, among other things, authorized it:

> Section A: To carry on the business of cotton merchants including the buying and selling of spot cotton, the dealing in cotton futures, the storing, warehousing, insuring, and hedging of the cotton and cotton sales or puchases; [sic] the borronwin [sic] or lending of money, unsecured, or secured by cotton warehouse receipts or otherwise, and in general, any other business that may be allied therewith, or ancillary thereto, or useful in the advancement of the general purposes of the business of cotton merchants, and any other business that can be conducted along with said business, or that might advance the purposes, including the right to deal in any commodity by the actual sale or purchase of same by private negotiations or on any organized market, and also including the purchases or sales of future contracts or hedges for any such other commodity.

Pittman set up several defenses in his answer, and pleaded that Allenberg Cotton Company was a foreign corporation, doing business in Mississippi, but it had never qualified to do so by securing a certificate of authority as required by Mississippi Code 1942 Annotated section 5309-221 (Supp. 1972). Pittman alleged that, as a consequence of this failure to qualify, Allenberg was not entitled to maintain its suit under the provisions of Mississippi Code 1942 Annotated section 5309-239 (Supp. 1972), which is (in part) as follows:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted

[fol. 3] to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.

The proof showed that Allenberg had arranged with one Covington, a local cotton buyer, with his office in Marks, Mississippi, to act for them (although it is denied that this made him its agent) "to contract cotton" from cotton farmers to be produced in Quitman County, Mississippi. Although Covington had performed this service for another company in 1967, in 1970 and in 1971 he acted exclusively for Allenberg. Under his arrangement with Allenberg, Covington would contact Quitman County farmers and, if they agreed to produce and sell their cotton crop to Allenberg, he would obtain all information necessary to the preparation of a purchase contract, telephone this information to Allenberg's Memphis office where a contract would be prepared and signed by an official of Allenberg. This document would then be forwarded to Covington at his office in Marks. On its receipt, Covington would get in touch with the farmer who would then come in to Covington's office in Marks and there execute the contract. One copy would be retained by Covington in his Marks office, one copy would be given to the farmer and the third copy sent to Allenberg Cotton Company. For these services Covington received a commission on each bale of cotton delivered to Allenberg's account at

[fol. 4] the warehouse. Covington kept a record of these contracts in his Marks office, including a record of whether the farmers were delivering as required by their contracts. Farmers were paid for cotton

delivered under the Allenberg contracts by Covington who drew upon Allenberg for the money.

Covington testified that the Pittman contract, here involved, had been brought personally to his office in Marks by the official of Allenberg who was in charge of the "Memphis Territory" which included Mississippi. He recalled that seven or eight other similar Quitman County contracts had also been brought down at the same time. He stated that usually, but not always, the contracts were mailed to him by Allenberg and that actually it was not necessary for an official of the company to come to Marks, saying "I could tend to it. I reckon I was supposed to do something." He stated that he kept up with whether deliveries of cotton were being made by the farmers as required by the contracts and that some contracts were "adjusted" by an official of Allenberg who would come down to Quitman County for that purpose.

It appears that Allenberg, through its representative, Covington, by whatever name called, in the year 1971 alone, the second year of its Mississippi operation, made 20 to 25 similar contracts covering 9,000 acres of cotton land in Quitman County, Mississippi.

It is apparent that these transactions of Allenberg in each case, including that with Pittman, took
[fol. 5] place wholly in Mississippi. The contract was negotiated in Mississippi, executed in Mississippi, the cotton was produced in Mississippi, delivered to Allenberg at the warehouse in Mississippi, and payment was made to the producer in Mississippi. All interest of the producer in the cotton terminated finally upon delivery to Allenberg at the warehouse in Marks. The fact that afterward Allenberg might or might not sell the cotton in interstate commerce is irrelevant to the issue here, as

the Mississippi transaction had been completed and the cotton then belonged exclusively to Allenberg, to be disposed of as it saw fit, at its sole election and discretion.

The facts stated were developed upon the hearing of the plea and are without substantial dispute. The chancellor held, however, that Allenberg was not doing business in Mississippi within the meaning of the statute. It having been stipulated that no further defense would be offered, the court entered a decree awarding Allenberg judgment against Pittman for $18,156.00 as damages sustained because of his breach of the contract. This appeal has been prosecuted by Pittman from that decree.

It is argued on behalf of Allenberg that its Mississippi activities fall within the following statutory exceptions.

> Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this Act, by reason of carrying on in this state any one
> [fol. 6] or more of the following activities:
>
> . . . .
>
> (d) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts.
>
> (e) Transacting any business in interstate commerce.

We cannot agree. The entire transactions with respect to Mississippi cotton contracts took place in Mississippi. The contracts were not "orders", within the commonly accepted meaning of that word, "requiring acceptance without this state before becoming binding contracts."

Aside from the fact that they were not "orders", they became contracts only when executed by the producer at Marks, Mississippi.

The affixation of Allenberg's signature in Memphis to a contract form before it was sent or brought to Marks for execution by the producer in nowise made it a contract prior to its acceptance and execution by the producer at Marks. Nor is the transaction converted into interstate commerce because, after the cotton had been delivered to Allenberg at the warehouse in Marks and title thereto had become vested in Allenberg in Mississippi, Allenberg, at its own election and for its own purposes, might afterward sell it in interstate commerce.

In order to maintain an action in a court of this State, a foreign corporation doing business in this
[fol. 7] State must qualify as required by the statute at the time the cause of action accrued. Parker v. Lin-Co Producing Company, 167 So.2d 228 (Miss. 1967).

Nor may a foreign corporation, doing business in Mississippi without having qualified as required by statute, maintain an action in a court of this State to enforce a cause of action which accrued as the result of doing such business. Bunge Corporation v. St. Louis Terminal Field Warehouse Company, 295 F. Supp. 1231 (N.D. Miss. 1969).

Where the charter of a foreign corporation provided that it was formed to sell, lease and exchange real estate of all kinds, and such corporation obtained a lease upon Mississippi real property for a ten year term, and thereafter renewed it for an additional ten years and paid rentals under the provisions of such renewal and initial leases and sought an option to purchase the real estate, the corporation was held to have been "transacting business" in

Mississippi within the meaning of the statute. S & A Realty Company v. Hilburn, 249 So.2d 379 (Miss. 1971).

The plea should have been sustained and Allenberg's suit should have been dismissed. The judgment appealed from is, therefore, reversed and judgment is entered here sustaining the plea interposed by Pittman against the right of Allenberg to maintain its suit against him in the Mississippi Court, and the suit is dismissed.

REVERSED AND JUDGMENT ENTERED FOR APPELLANT.

GILLESPIE, C.J., and PATTERSON, INZER and ROBERTSON, JJ., CONCUR.

IN THE SUPREME COURT OF MISSISSIPPI

[fol. 1]

MONDAY, MAY 14, 1973, COURT SITTING : : : : : : : :

BEN E. PITTMAN

#47,037 VS

ALLENBERG COTTON COMPANY

This cause this day came on to be heard on the Petition for a Rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said Petition be and the same is hereby denied.

MINUTE BOOK "BQ" PAGE 195

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[fol. 1]

BEN E. PITTMAN,
Appellant

vs.

ALLENBERG COTTON COMPANY, INC.,
Appellee

NO. 47,037

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed August 8, 1973)

I. Notice is hereby given that Allenberg Cotton Company, Inc., the appellee above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Mississippi, entered on May 14, 1973 denying appellee's petition for rehearing and giving finality to the court's judgment and order dismissing appellee's suit.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the clerk of the Supreme Court of the United States.

III. The following question is presented by this appeal:

Whether the Mississippi Supreme Court's application of Miss. Code 1942 Ann. Section 5309-239 (Supp. 1972) to

Notice of Appeal

Allenberg Cotton Company, Inc., a Tennessee corporation, to bar it from maintaining suit in the courts of Mississippi is repugnant to the Commerce Clause of the Constitution of the United States, U. S. Const., art. I, Section 8, cl. 3.

GOODMAN, GLAZER, STRAUCH & SCHNEIDER

By /s/ William W. Goodman

MAYNARD, FITZGERALD, MAYNARD & BRADLEY

By /s/ Wm. H. Maynard

Attorneys for Allenberg Cotton Company, Inc.

[fol. 2] PROOF OF SERVICE

I, William H. Maynard, one of the attorneys of record for Allenberg Cotton Company, Inc., depose and say that on the 6 day of August, 1973 I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the attorneys for Ben E. Pittman by depositing copies of the same in the United States mails, first class postage prepaid addressed to the Hon. Ellen E. Goldman, P. O. Box 88, Marks, Mississippi, 38646, and to the Hon. Anna C. Madden, Cliff Finch Bldg., Batesville, Mississippi 38606.

/s/ William H. Maynard

Subscribed and sworn to before me at Clarksdale, Miss. this 6 day of August, 1973.

/s/ Sherry J. Ely
Notary Public

My commission expires:
5-26-74

SUPREME COURT OF THE UNITED STATES

[fol. 1] No. A-177

ALLENBERG COTTON COMPANY, INC.,
Petitioner,

v.

BEN E. PITTMAN

ORDER

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari or for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including October 11, 1973.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this Seventh
day of August, 1973.

IN THE SUPREME COURT OF MISSISSIPPI

[fol. 1]

BEN E. PITTMAN

VERSUS

ALLENBERG COTTON COMPANY, INC. } NO. 47,037

ORDER CERTIFYING ISSUES DECIDED

On application of the appellee, Allenberg Cotton Company, Inc., this Court in addition to the orders made herein, hereby certifies and makes a part of the record in this case and of the judgment and entry of reversal heretofore rendered and made herein, that in this appeal from the Chancery Court of Quitman County, and in the arguments both oral and by brief made in this Court on behalf of the appellee on the original appeal and the petition of appellee for rehearing and brief filed in support thereof, it was insisted by appellee that under the facts of this case, the contract sued upon by the appellee was made in "interstate commerce" and that it was transacting business in interstate commerce, and thus entitled to protection as such under the applicable statutes of Mississippi and the Commerce Clause of the Federal Constitution; and that in its deliberation of this case, this Court both on the original appeal and the petition for rehearing considered these questions of interstate commerce; and it was the judgment of this Court that said contract was not made in interstate commerce, nor that the facts of the

[fol. 2] case showed appellee to be transacting business in interstate commerce within the meaning of the laws of Mississippi and that Mississippi Code 1942

Ann. Section 5309-239 (Supp. 1972) as applied by this Court in this case to the Allenberg Cotton Company, Inc., a Tennessee corporation, to bar it from maintaining suit in the courts of this state was not repugnant to the Commerce Clause of the United States Constitution; and it was necessary to the Court's judgment in said case to determine said questions raised as to interstate commerce, and that such questions were determined adversely to the position of appellee.

It is hereby certified that this Court is the highest court of law and equity in the State of Mississippi in which a decision of this case could be had.

ORDERED, this the 17th day of August, 1973.

/s/ Robert G. Gillespie
CHIEF JUSTICE
SUPREME COURT OF MISSISSIPPI

[fol. 3]

STATE OF MISSISSIPPI
HINDS COUNTY

I, Mrs. Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the Order Certifying Issues Decided by the Court in the case of Ben E. Pittman versus Allenberg Cotton Company, Inc., No. 47,037 - as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Mississippi, this the 17th day of August, A.D. 1973.

/s/ Julia H. Kendrick
SUPREME COURT CLERK